

## UIdaho Law Digital Commons @ UIdaho Law

---

Not Reported

Idaho Supreme Court Records & Briefs

---

5-14-2012

# Maschek v. State Appellant's Reply Brief Dckt. 38517

Follow this and additional works at: [https://digitalcommons.law.uidaho.edu/not\\_reported](https://digitalcommons.law.uidaho.edu/not_reported)

---

### Recommended Citation

"Maschek v. State Appellant's Reply Brief Dckt. 38517" (2012). *Not Reported*. 186.  
[https://digitalcommons.law.uidaho.edu/not\\_reported/186](https://digitalcommons.law.uidaho.edu/not_reported/186)

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ UIdaho Law. It has been accepted for inclusion in Not Reported by an authorized administrator of Digital Commons @ UIdaho Law. For more information, please contact [annablaine@uidaho.edu](mailto:annablaine@uidaho.edu).

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

<b>SPENCER JAY MASCHKE,</b>	)	
	)	
<b>Plaintiff-Appellant,</b>	)	<b>NO. 38517</b>
	)	
<b>v.</b>	)	
	)	
<b>STATE OF IDAHO,</b>	)	
	)	
<b>Respondent.</b>	)	

---

**APPELLANT'S REPLY BRIEF**

---

**APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF TWIN FALLS**

---

**HONORABLE G. RICHARD BEVAN**  
District Judge

---

**GREG S. SILVEY**  
Attorney at Law  
P.O. Box 565  
Star, Idaho 83669  
  
(208) 286-7400

**LORI A. FLEMING**  
Deputy Attorney General  
Criminal Law Division  
P.O. Box 83720  
Boise, Idaho 83720-0010  
(208) 334-2400

**ATTORNEY FOR  
APPELLANT**

**ATTORNEY FOR  
RESPONDENT**



## **TABLE OF CONTENTS**

	<b><u>PAGE</u></b>
TABLE OF AUTHORITIES .....	ii
ARGUMENT .....	1
The District Court Erred When It Summarily Denied Post Conviction Relief Without Considering The Record Which Established Petitioner's Claims Of Ineffective Assistance Of Counsel, Or, In The Alternative, Petitioner Is Entitled To Post Conviction Relief Since His Attorney Failed To Move To Withdraw His Guilty Plea When He Did Not Receive Probation Despite The Court's Express Advice That He Could	
CONCLUSION .....	5
CERTIFICATE OF SERVICE .....	5

## **TABLE OF AUTHORITIES**

### **Cases:**

<i>Gonzales v. State</i> , 120 Idaho 759 (Ct.App. 1991) .....	4
<i>Saykhamchone v. State</i> , 127 Idaho 319 (1995).....	4

## ARGUMENT

**THE DISTRICT COURT ERRED WHEN IT SUMMARILY DENIED POST CONVICTION RELIEF WITHOUT CONSIDERING THE RECORD WHICH ESTABLISHED PETITIONER'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL, OR, IN THE ALTERNATIVE, PETITIONER IS ENTITLED TO POST CONVICTION RELIEF SINCE HIS ATTORNEY FAILED TO MOVE TO WITHDRAW HIS GUILTY PLEA WHEN HE DID NOT RECEIVE PROBATION DESPITE THE COURT'S EXPRESS ADVICE THAT HE COULD**

As to the misrepresentation of the record by the prosecutor, it appears that Respondent damns with faint defense. Respondent (correctly) does not suggest the portion of the transcript omitted by the prosecutor where the court advised Petitioner the circumstances under which he could withdraw his guilty plea was not relevant to claims concerning the failure of Petitioner's attorney to move to withdraw his guilty plea.

Rather, Respondent points out only that the prosecutor, while omitting a relevant portion of the transcript, also requested the court take judicial notice of the entire transcript (along with 31 other documents from the criminal case). Further, Respondent argues that any misrepresentation doesn't matter because this Court reviews the entire record.

Appellant urges this Court to reject Respondent's theory, where an attorney need not accurately represent the record as long as the court has the full record so it can discover the misrepresentation itself, and/or the matter can be appealed.

Also, Respondent assumes too much when it claims the district court quoted directly from the transcript and not the state's brief, since the court quoted only from

the portion of the transcript quoted in the state's brief. But even if the court was quoting from the transcript itself, it missed the relevant portion of the transcript, helped no doubt by the state's misleading representation. Or, if the court read the whole thing, then it erred by ignoring the evidence in the record supporting Petitioner's claims and then summarily dismissing the claims because they were unsupported by evidence. Regardless of the ultimate interpretation of the criminal court's advice, it still needed to be considered and a decision made as to its meaning and effect.

As to that interpretation, Appellant will repeat the criminal court's comments at issue once more for this Court's convenience.

The charge of conspiracy to commit first degree arson carries a potential penalty of 25 years in the Idaho State Penitentiary and a \$100,000 fine. Do you understand that those are the maximum penalties that you face?

THE DEFENDANT: Yes.

THE COURT: And that if it became necessary to actually sentence you in this case because you were not accepted into mental health court— well, let me rephrase it this way. Do you understand that's the maximum penalty that could be imposed in this case?

THE DEFENDANT: Yes, sir.

THE COURT: Again, I have told your attorneys, pursuant to a chambers conference that we had yesterday, that since this matter is presented to me as a Rule 11 plea agreement that I will honor the recommendations of the state to place you on probation. Do you understand that if for some reason something would come up and I would change my mind about that, that I would allow you to withdraw your plea of guilty? Do you understand that?

THE DEFENDANT: Yes, sir.

Transcript of Change of Plea hearing, 8/7/2008, p. 8, ln. 14—p. 9, ln. 10 (emphasis added).

The state is wrong as to what this passage means. And since it is wrong in its major premise, the rest of its arguments are unavailing as well. The state argues in its brief:

Viewed in context, the court's statement to Maschek that it would permit him to withdraw his plea if it did not honor the state's recommendation for probation was merely a promise to place Maschek on probation if he was accepted into Mental Health Court;

Respondent's brief, p. 22 (emphasis added).

The state is wrong because the court's comments immediately preceding show that the court was explaining what would happen if he was not accepted into mental health court, not what would happen if he was accepted into mental health court but the court nevertheless chose not to place him on probation.

In other words, whether the court was right or wrong in saying so, the context shows the court advised Mr. Maschek that if was necessary to sentence him because he was not admitted into mental health court (and so would not be placed on probation), he would be allowed to withdraw his guilty plea.

Again, Appellant asserts that Petitioner is entitled to relief based on this advice since litigants should be able to trust the oral pronouncements of judges. Alternatively, an evidentiary hearing was required so the post conviction court could determine what this statement meant and what the criminal court (a different judge) would have done in light of his comments if a motion to withdraw guilty plea would have been brought at any point. Of course, both on appeal and below, for the purposes of summary disposition, the evidence and the reasonable inferences

therefrom must be viewed in the light most favorable to Petitioner. *Saykhamchone v. State*, 127 Idaho 319 (1995); *Gonzales v. State*, 120 Idaho 759 (Ct.App. 1991).

Likewise, an evidentiary hearing was required regarding the claim that counsel failed to adequately explain the plea agreement and what would happen if Petitioner was not accepted into mental court. Contrary to Respondent's arguments, there is much more evidence to support this claim than Petitioner's statements. The record shows he was told varying things, some of which suggested he would not end up in prison.

In addition to the court telling him he could withdraw his guilty plea, above, the court also told him "[i]f for some reason you don't qualify, then what happens is you come back before me for sentencing and we look at some alternatives."

Also, the plea agreement provided "[i]f the defendant is not accepted into MHC, the state will limit itself to a period of retained jurisdiction, not actual penitentiary time to be served." (Offer-Plea Agreement, Exhibit on Appeal.)

So court told him that they would look at some alternatives, not necessarily that he would send him to prison. Further, the plea agreement makes it sound like at most Mr. Maschek would simply do a rider, not that he could do a rider and then serve "actual penitentiary time."

Quite frankly, it can hardly be said that Petitioner clearly understood the terms of the plea agreement since the oddly worded term providing "not actual penitentiary time to be served" if he were not admitted into mental health court, along with the varying advice of the court, would make the terms anything but clear to a defendant.

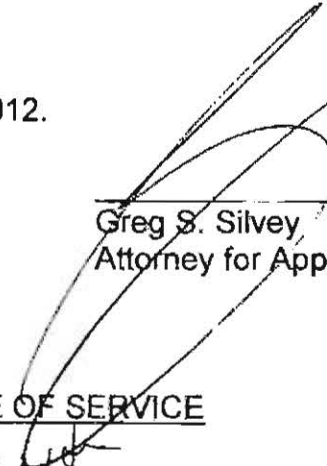


To summarize, the record itself shows that Mr. Maschek is entitled to post conviction relief. Alternatively, when the evidence and the reasonable inferences therefrom are reviewed in the light most favorable to Petitioner, there was sufficient evidence for the three claims to require an evidentiary hearing.

### CONCLUSION

Wherefore, for the reasons as stated above and in his brief in chief, Appellant/Petitioner respectfully requests that the district court's summary denial of the post conviction petition be reversed and that this matter be remanded for entry of post conviction relief by vacating the conviction, or in the alternative, remanded for an evidentiary hearing.

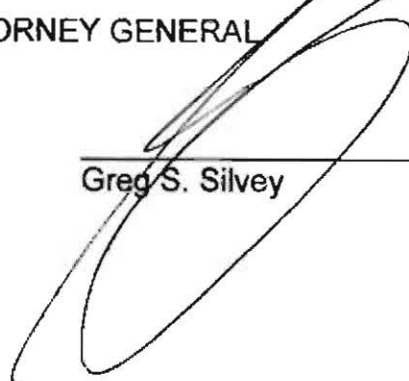
DATED this 14 day of May, 2012.

  
\_\_\_\_\_  
Greg S. Silvey  
Attorney for Appellant

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14 day of May, 2012, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF to the following, by hand delivering a copy to the Attorney's General's mailbox at the Supreme Court and by emailing a PDF copy to [patricia.miller@ag.idaho.gov](mailto:patricia.miller@ag.idaho.gov):

LORI A. FLEMING, DEPUTY ATTORNEY GENERAL

  
\_\_\_\_\_  
Greg S. Silvey